

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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MICHAEL THOMAS and MARIE E. THOMAS,

Plaintiffs-Appellees,

v

JOHN L. SMELTZER and DEBRA A.  
SMELTZER,

Defendants-Appellants.

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UNPUBLISHED

August 23, 2007

No. 268364

Genesee Circuit Court

LC No. 04-079851-CZ

Before: White, P.J., and Zahra and Fort Hood, JJ.

PER CURIAM.

In this property dispute, defendants appeal as of right from the trial court's order granting a declaratory judgment in plaintiffs' favor and permanently enjoining defendants from maintaining a seasonal dock at the shore of a park dedicated to the use of subdivision property owners and from mooring of boats near the water's edge of the park other than during daylight hours. We reverse.

In 2003, plaintiffs purchased lot 51 in the Shoreacres Homesites subdivision. The property abuts Lake Fenton.<sup>1</sup> The plat map identifies a small park between lots 51 and 52 that also abuts the water's edge. Several similar parks are located on the subdivision plat. In relevant part, the subdivision plat dedication provides that "the drives, parks and walks as shown on said plat are hereby dedicated to the use of all present or future owners of land in this plat." Defendants own property across the street from plaintiffs and have resided there since approximately 1990. Defendants purchased the property from defendant John Smeltzer's mother, who had owned the property since around 1971. From approximately the end of May to late October, defendants annually place a dock at the park's water's edge, and moor a pontoon boat off the end of the seasonal dock.

Plaintiffs filed suit alleging claims of conversion, trespass, and public nuisance, and seeking an injunction to enjoin defendants from placing a boat dock off the park. The court

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<sup>1</sup> Lake Fenton is identified as Long Lake on the plat map and the names were used interchangeably in the record.

granted summary disposition in defendants' favor on the conversion claim. Following a bench trial, the trial court granted plaintiffs' motion to amend their complaint to seek declaratory relief. The court also granted defendants' motion to amend the pleadings to add as an affirmative defense a claim of prescriptive easement.

The court ruled that the language of the dedication at issue in this case is unambiguous, and that the "use" of the parks permitted therein gave defendants "access to the waterway to enjoy the water, for the purposes for which you enjoy water; and it does not give them a right to erect permanent objects in the water or along the water's edge under any circumstances, unless you're a riparian owner." The court also granted a permanent injunction enjoining non-riparian landowners from permanently placing docks or boats in the lake fronting the park between lots 51 and 52. The court rejected plaintiffs' nuisance and trespass claims. The court also rejected defendants' prescriptive easement claim, finding "no evidence of continuous possession" where defendant John Smeltzer admitted he installed the dock seasonally. The court entered a final order encompassing its oral ruling and clarifying that swimming, boating, fishing, and sunbathing could occur during daylight hours on the park or in the water off the park.

We first address defendants' claim that the trial court improperly analyzed and dismissed their prescriptive easement claim. We agree and reverse on that basis.

A prescriptive easement is established by "*First*, continued and uninterrupted use or enjoyment; *second*, identity of the thing enjoyed; *third*, a claim of right adverse to the owner of the soil known to and acquiesced in by him." *Plymouth Canton Community Crier, Inc v Prose*, 242 Mich App 676, 679-680; 619 NW2d 725 (2000), quoting *St Cecelia Society v Universal Car & Service Co*, 213 Mich 569, 577; 182 NW 161 (1921), quoting 9 RCL, Easements, § 33. A prescriptive easement may be established where an express easement has failed, but has been treated as if properly established. *Plymouth Canton Community Crier, supra* at 684-685. In addition, "[o]wnership of easement rights may be acquired by prescription in the same general way and time that title to land may be acquired by adverse possession." Cameron, *Michigan Real Property Law*, § 6.11, p 226, citing *Dummer v United States Gypsum Co*, 153 Mich 622; 117 NW 317 (1908). "Adverse or hostile use is use inconsistent with the right of the owner, without permission asked or given, use such as would entitle the owner to a cause of action against the intruder[.]" *Plymouth Canton Community Crier, supra* at 681, quoting *Goodall v Whitefish Hunting Club*, 208 Mich App 642, 646; 528 NW2d 221 (1995), quoting *Mumrow v Riddle*, 67 Mich App 693, 698; 242 NW2d 489 (1976).

The trial court concluded regarding plaintiffs' prescriptive easement claim:

There is no evidence of continuous possession by your client. Even by your own—your client's own testimony and your own statements, your client was using this dock seasonally, so there wasn't that continuousness that's necessary in a prescriptive [sic] easement. That's one of the elements that has to be made out; and so, therefore, I don't find that there is a prescriptive [sic] easement. There is an easement, which according to the law gives you an interest in – in land, but it doesn't give you a fee simple interest or it doesn't give you ownership interest. It just gives you an interest in the easement and that's it.

We conclude that the trial court clearly erred by holding that seasonal usage cannot satisfy the continuity element of a prescriptive easement. *Dyer v Thurston*, 32 Mich App 341, 344; 188 NW2d 633 (1971) (observing that seasonal use of a pathway to a summer cottage is considered continuous use, given that it is “in keeping with the nature and character of the right claimed”). Clearly, the nature of the use here, a dock, is seasonal, and in such a case prescriptive rights can arise from seasonal use alone, provided it is continuous and uninterrupted.

Further, defendants clearly established the requisite continued and uninterrupted adverse use of the dock. Smeltzer and Bacon’s testimony established that, while defendants Smeltzer bought the property in 1990, just short of the requisite 15 years, John Smeltzer acquired the property from his mother, who owned the property from around 1971 and who also maintained a dock at that location. Thus, defendants established use for the requisite fifteen-year period.<sup>2</sup> We therefore reverse the trial court’s dismissal of defendants’ claim of prescriptive easement. In light of our disposition, we need not address defendants’ remaining assertions of error.

Reversed, and remanded for entry of a judgment for prescriptive easement in favor of defendants. We do not retain jurisdiction.

/s/ Helene N. White  
/s/ Brian K. Zahra  
/s/ Karen M. Fort Hood

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<sup>2</sup> In addition to asserting that defendants did not establish continuity of use and that the trial court so properly concluded, plaintiffs also argue that defendants did not establish that their use and enjoyment was adverse or hostile to the dedication, as they had used the property at issue without incident. We disagree. To show that use of the property claimed as an easement was hostile “does not require the claimant to prove that actual hostility or ill will existed between the claimant and the owner of the property. . . . Rather, to prove that a use was hostile, it is sufficient for the claimant to show that the use was made under a claim of right.” *Causes of Action to Establish Private Easement by Prescription*, 13 Causes of Action 277, § 5 Hostile use, cumulative supplement (2006), see also *Plymouth Canton Crier*, *supra* at 680-681.